HARMAN MINING CORP.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-1505, 86-1544 Decided August 3, 1989

Appeals from two decisions by Administrative Law Judge Joseph E. McGuire. The first decision denied applications for review of and tem-porary relief from Notice of Violation No. 85-13-289-1 (Hearing Docket No. NX 5-52-R), and assessed a civil penalty of $1,100 in connection therewith (Hearing Docket No. NX 5-33-P). The second decision denied an application for review of Notice of Violation No. 85-13-288-009 (Hearing Docket No. NX 5-120-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

APPEARANCES: John A. Macleod, Esq., Thomas C. Means, Esq., and R. Timothy McCrum, Esq., Washington, D.C., for Harman Mining Corporation; David P. Parks, Esq., Office of the Field Solicitor, Knoxville, Tennessee, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Harman Mining Corporation (Harman) has appealed from two decisions by Administrative Law Judge Joseph E. McGuire. In his first decision, dated

July 8, 1986, Judge McGuire denied Harman's applications for review of and temporary relief from Notice of Violation (NOV) No. 85-13-289-1 (Hearing Docket No. NX 5-52-R), issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) for utilizing a portion of Deel Fork Road, located in Buchanan County, Virginia, as a haul road without first having secured the necessary permit from the Virginia Department of Mined Land Reclamation (DMLR). In addition, Judge McGuire denied Harman's petition for review of OSMRE's civil penalty assessment of $1,100, based upon a total of 31 pen-alty points, in connection with NOV No. 85-13-289-1 (Hearing Docket No. NX 5-33-P).

In the second decision, dated July 23, 1986, Judge McGuire denied Harman's application for review of NOV No. 85-13-288-009 (Hearing Docket No. NX 5-120-R), 1/ issued by OSMRE for utilizing Little Prater Creek Road, also located in Buchanan County, Virginia, as a haul road without first having secured a surface coal mining permit from DMLR. The Board docketed Harman's appeals from Judge McGuire's two decisions as IBLA 86-1505 and IBLA 86-1544, respectively. Because these two appeals raise identical legal issues, we have consolidated them for decision.

Procedural Background

NOV No. 85-13-289-1 (IBLA 86-1505)

On December 7, 1983, OSMRE Reclamation Specialist William L. Arnett, Jr., conducted an inspection of an access and haul road which begins at the end of State Route 664 and extends approximately one-half mile up Deel Fork and Bull Creek (Deel Fork Road) to the upper end of a refuse area operated by Harman in Buchanan County, Virginia. After an investigation which included the review of records available in the Office of the County Administrator for Buchanan County, Arnett found no evidence that the half-mile portion of the road in question was a public road, and he concluded that Harman should have included it as part of interim permit number 3402-AF, subsequently converted to permanent pro-gram permit num-ber 1300468. On January 30, 1984, Arnett issued 10-day Notice No. X-84-13-73-1 to DMLR, advising it that the portion of roadway between State Route 664 and the upper end of Harman's refuse pile should have been included in the permit area. DMLR responded on February 21, 1984, advising that the area in question was a public road under Virginia law and should not be permitted, and asking OSMRE to withdraw the 10-day notice.

1/ Harman also filed an application for temporary relief from NOV No. 85-13-288-009, which Judge McGuire denied by decision dated Oct. 11, 1985, deciding that Harman was not likely to prevail on the merits. Thereupon, Harman filed a request for temporary relief in the U.S. District Court for the Western District of Virginia under section 526(c) of SMCRA, 30 U.S.C. | 1276(c) (1982), and on Oct. 28, 1985, District Judge Glen M. Williams granted temporary relief from Judge McGuire's decision, ruling that Harman was likely to prevail on the merits.

On October 29, 1984, OSMRE notified DMLR that enforcement action would be taken on the basis that Deel Fork Road did not meet the criteria for a public road. On January 7, 1985, Arnett issued NOV No. 85-13-289-1 for conducting surface coal mine operations without first having secured the necessary permit. The abatement measures specified in the NOV consisted of either submitting an application for a valid surface coal mining permit to DMLR covering the portion of Deel Fork Road then being used to facilitate coal mining activities on permit No. 1300468, or in the alternative, amending that permit by adding the portion of Deel Fork Road in question to the permit area. Harman was directed to abate the violation by 8 a.m. on February 8, 1985.

On February 1, 1985, Harman timely filed an application for review of the NOV, and on February 6, 1985, it also filed an application for temporary relief from that citation. On February 13, 1985, OSMRE issued a proposed civil penalty assessment in the amount of $1,100, based upon the assessment of 31 civil penalty points for the violation. On March 12, 1985, Harman filed a timely petition for review of that proposed civil penalty assessment. Judge McGuire consolidated Harman's applications and petition for purposes of hearing and disposition. See 43 CFR 4.1113; 30 U.S.C. § 1268(b) (1982).

By decision dated July 8, 1986, Judge McGuire denied Harman's applications for review of and temporary relief from NOV No. 85-13-289-1, and upheld OSMRE's civil penalty assessment of $1,100, predicated upon 31 civil penalty points. Judge McGuire ruled that the portion of Deel Fork Road at issue did not satisfy any of the three criteria embodied in 30 CFR 701.5, which defines "affected area" as including every coal and access and haul road utilized in surface coal mining and reclamation operations unless the road "(a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds and constructed in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use." 2/

Judge McGuire specifically noted that Harman's "use of the disputed section of Deel Fork Road * * * was not de minimis, or relatively minor," and concluded, in light of Judge Flannery's ruling in In re Permanent Surface Mining Regulation Litigation, 620 F. Supp. 1519, 1581-82 (D.D.C. 1985), that Harman had failed to show that it meets the public use criteria set forth at 30 CFR 701.5(c) (Administrative Law Judge Decision dated July 8, 1986, at 12).

Harman filed a timely appeal with this Board, challenging Judge McGuire's denial of its application for review of the NOV, and his denial of the related petition for review of the civil penalty assessment of $1,100. In addition, on August 5, 1986, Harman filed an action in the U.S.

2/ This definition of "affected area," which the Department promulgated on Apr. 5, 1983 (48 FR 14821-22), changed in certain respects the Department's previous definition of that term. See 46 FR 61099 (Dec. 15, 1981).

District Court for the Western District of Virginia, challenging Judge McGuire's denial of its application for temporary relief. Judge Williams of the district court granted Harman's request for temporary relief on August 7, 1986.

NOV No. 85-13-288-009 (IBLA 86-1544)

Harman is the permittee of L & L No. 9, an underground mine in Buchanan County, Virginia, Permit No. 1200219 (Tr. 15-16). On March 21, 1985, OSMRE Inspector Ronnie Vicars inspected the permit area, determining that Harman was using a 1.5 mile long haul road, also known as Little Prater Creek Road, for surface coal mining operations without having obtained the necessary permit from DMLR. On March 25, 1985, Inspector Vicars issued 10-day Notice No. X-85-13-288-08 to DMLR, requesting that the Commonwealth take enforcement action on Harman's use of this unpermitted haul road. In response to this 10-day notice, DMLR denied that it had jurisdiction over Harman's use of Little Prater Creek Road on the basis that it qualified as a public road under Virginia law. Upon determining that DMLR's response to the 10-day notice did not constitute appropriate action, Inspector Vicars reinspected the site on July 1, 1985, and he issued NOV No. 85-13-288-009 to Harman for conducting surface coal mining operations on lands without first obtaining a permit from the approved regulatory authority.

On July 26, 1985, Harman filed an application for review of the NOV, and on August 2, 1985, Harman filed an application for temporary relief from the abatement period specified in the NOV, which had been extended to September 27, 1985.

On September 26, 1985, Judge McGuire conducted a hearing on both applications. At the conclusion of the hearing, the parties jointly requested a ruling on Harman's application for temporary relief from the NOV, and agreed upon a briefing schedule on those issues presented in Harman's application for review of the NOV. Judge McGuire rendered an oral order denying Harman's application for temporary relief from the provisions of NOV No. 85-13-288-009.

By decision dated October 11, 1985, Judge McGuire confirmed his oral order denying Harman's application for temporary relief from NOV No. 85-13-288-009. Judge McGuire noted that Harman had met the first and the third conditions for temporary relief as set forth in section 525(c) of SMCRA, 30 U.S.C. § 1275(c) (1982), i.e., a hearing had been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard, and such relief would not have adversely affected the health or safety of the public or have caused significant, imminent environmental harm to land, air, or water resources. However, as to the second condition, Judge McGuire ruled that Harman had "failed to show that there is a substantial likelihood that the findings of the Secretary will be favorable to it in as much as applicant failed to show that OSM[RE] had improperly issued the NOV at issue" (Decision dated Oct. 11, 1985, at 3).

Judge McGuire's analysis of whether Little Prater Creek Road qualifies as a public road, and is therefore exempt from SMCRA, is set forth below:

> A recent memorandum opinion issued by Judge Thomas F. Flannery, of the United States District Court for the District of Columbia, in the matter resolving the remaining issues presented in In Re: Permanent Surface Mining Regulation Litigation III, No. 79-1144 (D.D.C. July 15, 1985), remanded to the Secretary that section of the implementing regulations upon which applicant relies namely, the definition of the term "affected areas" as found at 30 CFR 701.5.
>
> In ruling upon whether the Secretary had unlawfully defined the term "affected areas" at 30 CFR 701.5 to exclude certain roads that Congress intended to be covered by section 701(28) of the Act, Judge Flannery found that the Secretary's rule exempted essentially all public roads if the public's use thereof was more than incidental and was therefore inconsistent with that statutory definitional language found at section 701(28) of the Act.
>
> Even in the absence of that recent ruling, the evidence supports a finding that applicant has failed to show that there was a substantial likelihood that the findings of the Secretary would be favorable to it. Applicant's evidence failed to demonstrate that the road in question had been designated as a public road pursuant to the laws of the jurisdiction in which it is located, Code of Virginia, §§ 33.1 through 246 (1950). In addition, the road surface interest which may have been transferred by applicant to Buchanan County, as well [as] those of the abutting landowners, was an insufficient ownership interest to have allowed that jurisdictional entity to incorporate the road in question into its road system according to the applicable Virginia statutes governing the activity. [Footnotes omitted.]

(Decision dated Oct. 11, 1985, at 4).

On October 3, 1985, Harman sought review of Judge McGuire's denial of temporary relief from NOV No. 85-13-288-009 in the U.S. District Court for the Western District of Virginia. By order dated October 28 as amended November 27, 1985, Judge Williams granted Harman's request for temporary relief pursuant to section 526(c) of SMCRA, 30 U.S.C. § 1276(c) (1982).

The parties filed post-hearing briefs on Harman's application for review of NOV No. 85-13-288-009, and by decision dated July 23, 1986, Judge McGuire denied Harman's application, sustaining OSMRE's issuance of the NOV. Judge McGuire concluded that Harman had failed to demonstrate

> that it is entitled to the exemption set forth in 30 CFR 701.5, as well as its identically worded counterpart in the Virginia permanent surface mining regulations [Chapter 23, | 2.02(p)], inasmuch as it has failed to show that Little Prater Creek Road has been

designated as a public road pursuant to the laws of the Commonwealth of Virginia.

(Decision dated July 23, 1985, at 8).

Judge McGuire noted that "Little Prater Creek Road has never been described as a public road on any maps of the Commonwealth of Virginia or those of Buchanan County." Id. at 7. He was convinced that Harman's conveyance of a 40-foot easement interest to Buchanan County on December 1, 1981, was inconsistent with its "contention throughout this proceeding that the public then generally regarded Little Prater Creek Road, applicant's coal access and haul road, as a public road." Id. Further, he concluded that Harman had failed to offer evidence as to the amounts of funds expended by Buchanan County on Little Prater Creek Road for maintenance purposes, "[n]or did it adduce any information concerning how that amount may have compared with the amounts expended on other roads which are regarded as being in the same classification within that county's road system." Id. at 9.

Harman filed a timely appeal from Judge McGuire's decision with this Board.

Discussion

In its statements of reasons (SOR) for appeal, Harman advances two primary arguments as to why Judge McGuire erred in upholding both of the NOV's described above. First, Harman argues that OSMRE lacked jurisdic-tion to issue the NOV's because in each instance DMLR had taken appropriate action in response to the 10-day notice involved (SOR, IBLA 86-1544, at 11; SOR, IBLA 86-1505, at 14-15). Second, Harman contends that even if OSMRE had the requisite authority to issue the NOV's, OSMRE erred in concluding that each road in question was not a public road and so failed to qualify for exemption from the permitting requirements of Virginia's permanent program (SOR, IBLA 86-1544, at 11-12; SOR, IBLA 86-1505, at 14).

According to Harman, SMCRA "plainly gives Virginia 'exclusive jurisdiction' to enforce its approved State Program for the regulation of surface coal mining operations within the state. 30 U.S.C. | 1253" (SOR, IBLA 86-1544, at 12; SOR, IBLA 86-1505, at 14-15). Harman argues that through 30 CFR 843.12(a)(2) "the Secretary has purported to expand his statutory authority [under section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982)] to permit also the issuance of a Federal NOV where the state fails to take appropriate action [in response to a 10-day notice] but there is no imminent danger to the public or significant, imminent environmental harm" (SOR, IBLA 86-1544, at 13). Harman insists that it is not questioning the validity of 30 CFR 843.12(a)(2) in these appeals, but rather that it is asking the Board to "construe the regulation so as to harmonize it with the Act it implements" (SOR, IBLA 86-1544, at 13 n.6). The construction of 30 CFR 843.12(a)(2) which Harman proposes is set forth below:

> [T]he regulation cannot, consistent with the Act, be construed to authorize OSM[RE] to substitute itself as the primary enforcer

> of the applicable law (which is the State Program) or to assert a concurrent enforcement role where the state regulatory authority has taken what it believes to be appropriate action. SMCRA sim-ply does not, and the regulation cannot be construed to, permit OSM[RE] to reject, ignore, second-guess or otherwise disregard the state's determination and to directly issue its own NOV. Nowhere in the Act or in the federal regulations is there any shred of OSM[RE] authority to disregard or otherwise reject the state's enforcement decisionmaking in response to a Ten-Day Notice. [Footnote omitted.]

(SOR, IBLA 86-1544, at 13-14).

Harman states that the "only colorable authority" for OSMRE's issuance of the NOV's involved herein is 30 CFR 843.12(a)(2), 3/ under which OSMRE is authorized to issue an NOV only if "the state fails * * * to take appropriate action to cause the violation to be corrected or to show good cause for such failure." Harman maintains that DMLR "took appropriate action concerning the alleged violation by investigating and determining that the road[s] did not have to be permitted under the Virginia State Program" (SOR, IBLA 86-1544, at 20; SOR, IBLA 86-1505, at 20). In Harman's view, once DMLR timely notified OSMRE of its determination that enforcement action was unnecessary with respect to each of the 10-day notices, OSMRE's jurisdiction over these matters ended.

Secondly, Harman argues that even if the Board rejects its interpretation of 30 CFR 843.12(a)(2), it must reverse Judge McGuire's findings that Deel Fork Road and Little Prater Creek Road are not public roads for purposes of SMCRA. Harman points out that effective March 16, 1984, the Secretary approved Virginia's "Coal Haul Road Policy" as an amendment to the Virginia State program. 49 FR 9898. As amended, the Virginia program provides that a permit must be obtained for all roads used, constructed, or significantly improved for coal haulage or minesite access, but it exempts from permitting those public roads which satisfy three criteria: "(a) the road has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) the road is maintained by public funds and constructed in a manner similar to other public roads in the same classification in the jurisdiction in which it is located; and (c) there is substantial (more than incidental) public use of the road." 49 FR 9898 (Mar. 16, 1984). Harman argues that both roads satisfy these three criteria, exempting them from the permitting requirements.

3/ Harman recognizes that Congress empowered OSMRE with a continuing oversight role, with the authority to take several actions, including (1) issuance of its own cessation order under section 521(a)(1) and (2) of SMCRA, 30 U.S.C. § 1271(a)(1) and (2) (1982); (2) revocation of state primacy under section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982); and (3) challenging approval of a surface coal mining permit under sections 513 and 514 of SMCRA, 30 U.S.C §§ 1263 and 1264 (1982).

Harman asserts that whether a road is a "public county road under the laws of Virginia is uniquely within the special competence of local county officials to determine" (SOR, IBLA 86-1544, at 25). The testimony of county officials, Harman argues, was uncontradicted that each "road was and had long been a public county road." Id. Harman points to the follow-ing Virginia statute as authority for its position that Deel Fork Road and Little Prater Creek Road qualify as public roads:

> When a way has been worked by road officials as a public road and is used by the public as such, proof of these facts shall be prima facie evidence that the same is a public road. And when a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for a period of 20 years, proof of these facts shall be conclusive evidence that the same is a public road.

Code of Virginia § 33.1-184. Harman concludes that since its "evidence demonstrated that the road had been, at the least, periodically worked by road officials as a public road and had been used by the public as such continuously for a period of some 50 years, Little Prater [Creek] Road has been conclusively proved to be a public road" (SOR, IBLA 86-1544, at 26; see also SOR, IBLA 86-1505, at 23-24).

Moreover, Harman argues with regard to both roads that Judge McGuire's "attempt to portray the road expenditures as insubstantial, although in error, is largely irrelevant." Id. Harman contends that "[t]here is no requirement under the Virginia State Program public road exemption or the Code of Virginia § 33.1-184 that road maintenance expenditures be substantial" (SOR, IBLA 86-1544, at 27). Instead, the public road exemption in Virginia "requires only that the road be maintained in a manner similar to other public roads." Id.

Harman challenges Judge McGuire's emphasis on the fact that Buchanan County did not own a fee simple interest in either Little Prater Creek Road or Deel Fork Road. Harman argues that the conveyance to Buchanan County of all its ownership rights to the roads extinguished its "private rights" and strengthens the public status of the roads (SOR, IBLA 86-1544, at 29-30; SOR, IBLA 86-1505, at 26-27).

In addition, Harman argues that Judge McGuire erred in applying Judge Flannery's 1985 ruling in In re Permanent Surface Mining Regulation Litigation, III, supra. Harman contends that Judge McGuire, and this Board, should apply the three criteria of the Virginia State program to determine the status of Little Prater Creek Road and Deel Fork Road. In Harman's opinion, "[r]egardless of Flannery's ruling on judicial review of the federal surface mining regulations, the relevant provisions of the Virginia State Program are the law regulating surface mining in Virginia until they are changed" (SOR, IBLA 86-1544, at 31 (emphasis in original)). Moreover, Harman argues:

> Whatever change in the federal regulations may ultimately result from Judge Flannery's ruling remanding to OSM[RE] the federal

> definition of the term "affected area," his ruling itself has no direct effect on the Virginia State Program. On the contrary, the Act and the regulations provide that the Virginia State Program, as approved by OSM[RE], remains the law governing surface mining in Virginia unless and until OSM[RE] formally approves a change in that State Program. [Footnote omitted.]

(SOR, IBLA 86-1544, at 33-34; SOR, IBLA 86-1505, at 29). Harman maintains that a change in Virginia's program would have to comply with 30 CFR 732.17.

Harman supports its position that the definition of "affected area" in Virginia's program governs until OSMRE formally approves an amendment to that definition with the following statement by OSMRE published on November 20, 1986, in the Federal Register: "State programs will remain in effect until the Director of OSMRE has examined the provisions of each State program to determine whether changes are necessary and has notified the State regulatory authority pursuant to 30 C.F.R. § 732.17(c) and (d) that a State program amendment is required." 51 FR 41958 (Nov. 20, 1986).

Finally, Harman challenges OSMRE's civil penalty assessment of $1,100 for NOV No. 85-13-289-1, issued in connection with Deel Fork Road. Harman argues that OSMRE acted improperly when it "assigned Harman the maximum of 12 penalty points for negligence, when Harman was at all times acting in accordance with the specific instructions and requirements imposed by DMLR, the primary regulator of SMCRA in Virginia" (SOR, IBLA 86-1505, at 34 (emphasis in original)). According to Harman, this assessment "impermissibly penalizes Harman's reasonable reliance on the actions of the state regulatory authority through a retroactive application of OSM[RE]'s new regulatory constructions and practices." Id. at 36.

[1] We again reject the argument that OSMRE lacks authority to issue an NOV in states which have achieved primacy. Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), when read in conjunction with 30 CFR 842.12(a)(2), confers such authority in clear terms. Section 521(a)(1) of SMCRA provides in pertinent part:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. [Emphasis added.]

Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982).

The regulation at 30 CFR 843.12(a)(2) sets forth the enforcement alternatives available to OSMRE where the state regulatory authority fails to take "appropriate action" in response to a 10-day notice:

> When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that the appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is required before issuance of a notice of violation, if previous notification was given under § 842.11(b)(1)(ii)(B). [Emphasis added.]

As noted in recent Board decisions, the phrase "appropriate action" is defined neither in SMCRA nor in the regulations promulgated thereunder. See, e.g., Turner Brothers, Inc. v. OSMRE, 92 IBLA 320, 323 (1986). However, in promulgating 30 CFR 843.12(a)(2), OSMRE stated that "[t]he cru-cial response of a State is to take whatever action is necessary to secure abatement of the violation." 47 FR 35627-28 (Aug. 16, 1982). The Board concluded in Turner Brothers, Inc. v. OSMRE, 92 IBLA at 323, that

> use of the word "appropriate" requires OSM[RE] to exercise its discretion in determining whether the state's response to its 10-day notice is such that OSM[RE] must reinspect the site of the violation and issue either an NOV or a CO, depending upon the circumstances. We further find that OSM[RE], in evaluating the state's response to a 10-day notice, must determine whether the response is calculated to secure abatement of the violation. See Thomas J. FitzGerald, 88 IBLA 24, 29 (1985).

In Shamrock Coal Co. v. OSMRE, 81 IBLA 374 (1984), and Bannock Coal Co. v. OSMRE, 93 IBLA 225 (1986), the respective state regulatory authorities responded to OSMRE's 10-day notices by concluding that no enforcement action was necessary as a matter of state law. Appellants in those cases argued, as Harman argues herein, that OSMRE has no authority to "second-guess" the state regulatory authority when it determines that under its approved program there is no violation to be abated. In Shamrock and Bannock, the Board ruled that the response of the state was inappropriate, and that OSMRE properly issued its own NOV's upon reinspecting the sites of the violations. We reject Harman's argument that any action taken by a state in response to a 10-day notice will necessarily preempt the authority of OSMRE to conduct an oversight inspection and cite a violation which was the subject of the

10-day notice. As we stated in Turner Brothers, Inc., supra, "[w]e will affirm the issuance of an NOV and a subsequent CO for failure to abate where the record supports the finding of OSM[RE] that the state regulatory authority failed to take appropriate action to ensure abatement of a violation in response to a 10-day notice * * *." 92 IBLA at 326.

However, we will vacate an NOV and a subsequent CO where the record establishes that the action of the state regulatory authority was "appropriate" under the specific facts of a case. Turner Brothers, Inc. v. OSMRE, 99 IBLA 87 (1987). Whether OSMRE properly issued the NOV's in this case requires that we evaluate DMLR's determination that Little Prater Creek Road and Deel Fork Road are public roads under the Virginia State program.

In Harman Mining Corp. v. OSMRE, 659 F. Supp. 806 (W.D. Va. 1987), Judge Williams concluded that since both roads are public roads, their use by Harman does not constitute "surface coal mining operations" as that term is defined in section 701(28)(B) of SMCRA, 30 U.S.C. § 1291(28)(B) (1982). As earlier noted, Harman petitioned the district court for review of Judge McGuire's decisions denying its requests for temporary relief from the two NOV's at issue herein. Judge Williams evaluated Harman's requests for temporary relief under section 526(c) of SMCRA, 30 U.S.C. § 1276(c) (1982), concluding that the first and third criteria embodied therein were undisputably met. 4/ He also concluded that Harman met the second criterion, i.e., that Harman has shown that there is a substantial likelihood that it will prevail on the merits. His reasons for concluding that Deel Fork Road and Little Prater Creek Road are public roads persuades us that Judge McGuire erred in ruling otherwise.

In addressing the question whether Harman is required to permit the roads, Judge Williams stated that "[p]reviously, the standard used to determine when an operator had to permit a road was whether it was a pub-lic road for purposes of the Federal Surface Mine and Control Reclamation Act." 659 F. Supp. at 810. He noted that the haul road policy contained in Virginia's approved regulatory program was identical to 30 CFR 701.5,

---

4/ Section 526(c) of SMCRA, 30 U.S.C. § 1276(c) (1982), provides as follows:

"In the case of a proceeding to review any order or decision issued by the Secretary under this chapter * * * the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if --

"(1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

"(2) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

"(3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources."

the Department's regulation defining "affected area." In In re Permanent Surface Mining Regulation Litigation, 620 F. Supp. 1519 (D.C.C. 1985), Judge Flannery remanded 30 CFR 701.5 to the Secretary as inconsistent with section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982), thus leaving "no federal regulation in effect concerning determination of public roads." 659 F. Supp. at 810. Judge Williams stated:

> Judge Flannery's action in remanding the federal regulation also invalidates the Virginia regulation, used to determine if a road is a public road, because it was identical to the federal regulation. In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 519 (D.C. Cir.), cert. denied, 454 U.S. 822, 102 S. Ct. 106, 60 L.Ed.2d 93 (1981), states clearly that state regulations must be consistent with the Secretary's. Since the federal regulation was inconsistent and invalid, Virginia's identical regulation is also invalid. To hold otherwise would allow Virginia's regulation to be inconsistent with the Act.

659 F. Supp. at 811.

Jude Williams reasoned that "[b]ecause there are no valid current federal or state regulations, this court must look to the Act itself," and "interpret § 1291(28)(B) to develop criteria to use in determining if Harman must permit Deel Fork Road and Little Prater [Creek] Road." 659 F. Supp. at 811. Section 701(28)(B) of SMCRA defines "surface coal mining operations" to include

> the areas upon which such [surface coal mining] activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage * * *.

Judge Williams rejected a literal reading of section 701(28)(B) of SMCRA which would require "that an operator permit an interstate if used for coal haulage." 659 F. Supp. at 811. In his view, "Congress did not anticipate that operators would have to permit interstate highways or four-lane state routes, nor that they would have to permit every road used to haul coal, whether four-lane or two-lane, state or county, paved or unpaved, or even public or private." Id. Because Judge Flannery ruled that 30 CFR 701.5 was inconsistent with SMCRA, but did not interpret section 701(28)(B) of SMCRA, Judge Williams concluded that his only alternative was to "simply examine the evidence in the record to determine if the roads in question are public roads." 659 F. Supp. at 812. Set forth below are his discussion of the evidence and his conclusion that Deel Creek Road and Little Prater Creek Road are public roads under section 701(28)(B) of SMCRA:

> OSM[RE] presented no evidence at the hearings that the roads are not public other than the statement of one OSM[RE] employee who

> testified that he saw "little public use" during his brief inspections. On the other hand, Harman presented substantial evidence that the roads are public. Specifically, Harman presented testimony of local residents and county officials, all of whom stated that the roads are public. In addition, Harman presented evidence of expenditures which Buchanan County made to maintain the roads. While these amounts are not substantial, the expenditures (made from public funds) provide strong evidence of the public nature of the roads. Lastly Harman presented evidence of the county's substantial expenditures to improve the roads; even stronger evidence of the road's public nature. This evidence, in conjunction with the fact that several private individuals use the roads for access to and from their homes and the fact that other coal mine operations use the roads for access and coal haulage, is more than sufficient to establish that the roads are public and, therefore, that Harman is not required to permit them.
>
> More importantly, Virginia law indicates that the roads are public:
>
> > The test [as to whether a road is public] is not simply how many do actually use [the road], but how many may have a free and unrestricted right in common to use them. If it is free and common to all citizens, then no matter whether it is or is not of great length, or whether it leads to or from a city, village or hamlet, or whether it is much or little used, it is a public road. (Citations omitted).
>
> Henringer v. Peery, 102 Va. 896, 899, 47 S.E. 1013, 1014 (1904); See Foster v. Board of Supervisors of Halifax County, 205 Va. 686, 689, 139 S.E.2d 65, 68 (1964) and Stewart v. Fugate, 212 Va. 689, 690, 187 S.E.2d 156, 157 (1972). This method of defining public as opposed to private roads is not exclusively Virginia's approach. See also Summer County v. Interurban Transp. Corp., 213 S.W. 412, 141 Tenn. 493 (1919); Bradford v. Mosley, Tex.Com.App., 223 S.W. 171, 173 (1920); Phillips v. Stockton, Tex. Civ. App., 270 S.W.2d 266, 270 (1954). The record indicates that there are no restrictions on who may use the roads in question. The roads are open to use by all citizens for any legal purposes. Therefore, the roads are public under Virginia law. As such this court finds that Harman has succeeded in proving that it is likely to prevail on the merits, and this court accordingly grants Harman's motion for a temporary injunction.

659 F. Supp. at 812.

In light of Judge Williams' analysis, we conclude that Judge McGuire improperly upheld the NOV's issued as the result of Harman's use of the two roads in question. In his October 11, 1985, decision denying temporary relief from NOV No. 85-13-288-009, in his July 23, 1986, decision denying Harman's application for review of NOV No. 85-13-288-009, and in his July 8, 1986, decision denying Harman's applications for review of an temporary

relief from NOV No. 85-13-289-1, Judge McGuire applied the standards for the public road exemption found in Virginia's permanent program regulations, which are identical to the standards in 30 CFR 701.5. 5/ Our review of Judge McGuire's decisions upholding the NOV's involved herein leads us to the same conclusions reached by Judge Williams in Harman Mining Corp. v. OSMRE, supra. Because of Judge Flannery's remand of 30 CFR 701.5, it was improper for Judge McGuire to apply either that regulation or its Virginia counterpart. Our search for criteria by which to evaluate the status of Little Prater Creek Road and Deel Fork Road leaves us with the terms of section 701(28)(B) of SMCRA. We find Judge Williams' interpretation and application of that statute in granting Harman's requests for temporary relief equally applicable in our consideration of these appeals on the merits.

We conclude that upon receipt of the 10-day notices involved herein, DMLR properly responded to OSMRE that Little Prater Creek Road and Deel Fork Road are public roads which are exempt from the permitting requirements of Virginia's permanent regulatory program. DMLR's responses to the 10-day notices constituted appropriate action under section 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2), and OSMRE's issuance of the NOV's and assessment of civil penalty was improper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed.

Gail M. Frazier
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

5/ As Judge Williams pointed out, Judge Flannery ruled in In re Permanent Surface Mining Regulation Litigation, supra, that 30 CFR 701.5 was inconsistent with section 701(28)(B) of SMCRA, on the basis that it exempts "essentially all public roads where public use is more than incidental." 620 F. Supp. at 1582. Judge Flannery stated that 30 CFR 701.5 is irrational on two bases: first, "it does not appear rationally related to the Secretary's concern that interstate highways not be required to be permitted and reclaimed under the Act"; and second, it does not square with the Secretary's own interpretation of section 701(28)(B) of SMCRA, i.e., that Congress intended SMCRA "to cover public roads used for coal haulage and access only when they are directly, rather than incidentally, part of the mining operation." 620 F. Supp. at 1582. In Judge Flannery's opinion, 30 CFR 701.5 "does not bear a logical nexus to the Secretary's goal in promulgating it, or to the Secretary's own stated understanding of what the law requires." 620 F. Supp. at 1582.